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Supreme Court of the United States

OCTOBER TERM, 1938.

No. 426.

MILK CONTROL BOARD OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

against

EISENBERG FARM PRODUCTS, a Pennsylvania Corporation,

Respondent.

BRIEF FOR COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK AS AMICUS CURIAE.

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On November 21, 1938, this Honorable Court granted the Pennsylvania Milk Control Board's petition for a writ of certiorari to review the order of the Supreme Court of Pennsylvania dated June 30, 1938 (200 Atlantic 254; R. 32). The appeal presents the question whether "a State statute regulating the milk industry by requiring that all milk dealers obtain a license, file a bond for the protection of farmers, and pay to farmers minimum prices prescribed by an administrative agency (or any one of said requirements) be enforced against a milk dealer buying milk at its plant within the State from farmers located therein for shipment to another State" (Petition, p. 2).

Importance of the Appeal to New York State.

The statute is severable (Section 1201, Act of April 28, 1937) and divides itself into three prominent phases, (1) Licensing (2) Bonding and (3) Price Fixing. The vital interest of the Commissioner of Agriculture and Markets, as official representative of New York's thousands of milk producers, is at this time centered in the bonding issue.* For years, New York milk producers have had the protection of a bonding law which is closely resembled in its essence by the relevant provisions of the Pennsylvania statute. As Section 258-b of the Agriculture and Markets Law (N. Y.) it provides:

§258-b. *Bonds and enforcement*

"1. Each milk dealer buying milk from producers for resale or manufacture shall execute and file a bond, unless relieved therefrom as hereinafter provided. The bond shall be upon a form prescribed by the commissioner, shall be in the sum fixed by him, but not less than two thousand dollars, shall be executed by a surety company authorized to do business in this state, and shall be conditioned for the prompt payment of all amounts due to producers for milk sold by them to such licensee, during the license year. The bond shall be approved by the commissioner.

"2. Upon default by the milk dealer in any conditions of the bond, if there is reason to believe that the milk dealer owes for milk purchased from producers, the commissioner shall give reasonable notice to file verified claims, and may if he deems it advisable fix a reasonable time within which such claims must be filed. The commissioner shall examine claims so filed and by certificate de-

*Affected with a public interest, the production and distribution of milk is a paramount industry of the State. Nebbia v. New York, 291 U. S. 502, 517. New York ranks third among the states in the production of milk and second in the value of dairy products—Report of the Joint Legislative Committee to Investigate the Milk Industry, N. Y. Legis. Doc. 114 of 1933; 3rd, production, 1937, Crops and Markets, U. S. Dept. of Agric. Feb. 1938, p. 22; 2nd, cash farm income, 1937, U. S. Dept. of Agric., Bureau of Agric. Economics, titled "Gross Farm Income and Government Payments", p. 15.

termine the amounts due upon them. The commissioner may bring an action upon the bond, and for the purposes of such action the certificate determining the amounts due shall be presumptive evidence of the facts therein stated. If the recovery upon the bond is not sufficient to pay all claims as finally determined, then it shall be divided *pro rata* among them.

"3. A milk dealer shall from time to time, when required by the commissioner, make and file a verified statement of his disbursements during a period to be prescribed by the commissioner, containing the names of the producers from whom milk was purchased, and the amount due to the producers thereof. If it appears from such statement or from facts otherwise ascertained by the commissioner that the security afforded to producers selling milk to such milk dealer by the bond does not adequately protect such producers, the commissioner may require such milk dealer to give an additional bond in a sum to be determined by the commissioner, but not more than double the value of the maximum amount of milk purchased from producers in any one month, and not exceeding in any event one hundred thousand dollars.

"4. The provisions of this article relative to a milk dealer buying milk from producers for resale or manufacture shall apply also to a milk dealer buying milk from a co-operative association or buying milk from another milk dealer or handling milk for or in conjunction with another person or persons, whenever protection by bond or otherwise is directed by the commissioner to protect the interests of producers.

"5. If the applicant for a license under this section be a natural person or a domestic corporation, the commissioner may, if satisfied from an investigation of the financial condition of the applicant that the applicant is solvent and possessed of sufficient assets to reasonably assure compensation to probable creditors, relieve such person or corporation by order from the provisions of this section requiring the filing of a bond until otherwise di-

rected. The commissioner may require, as a condition for so relieving such person or corporation from filing a surety bond, that cash be deposited with a bank or trust company, or bonds of the United States or State of New York be deposited with the director, under such terms as will in his opinion afford producers the protection intended by this section.

"6. Bonds for the license year commencing April first, nineteen hundred thirty-five and for subsequent years shall be filed with the applications."

There are on file for the license period commencing April 1, 1938 and ending March 31, 1939, 415 surety bonds representing a guarantee of $2,124,800.00; 160 depository agreements testifying to segregated bank deposits of a value of $303,594.06 and 32 approved Federal and State Government bonds worth $132,-018.75. All of these protect producers selling milk by a total guarantee of $2,560,412.81. Of course, all of the milk purchased does not cross state lines. Nevertheless, because many metropolitan dealers buying milk at up-state plants ship (by rail or truck) through Pennsylvania or New Jersey, or both, into New York City, state lines are crossed.* Milk is also shipped from New York State plants, where purchased from New York State producers, to New England markets. Unfortunately, the Commissioner of Agriculture and Markets is unable to offer exact figures or percentages as to

*According to "Statement Concerning the New York Metropolitan Milk Market and the Proposed Marketing Agreement" prepared by the Dairy Section, Division of Marketing and Marketing Agreements of the Agricultural Adjustment Administration (page 6) "Over 22 percent of all milk received at the market from approved plants passed through plants in New York State but was transported across State lines between the plant and the market." This was for the period December, 1936-November, 1937. The statement was received in evidence as Exhibit 8, Paul L. Miller, Witness, Stenographic Report of Hearing held at Albany, New York, May 16, 1938, on the proposed Marketing Agreement and Order regulating the handling of milk in the New York Metropolitan Milk Marketing Area, now Order No. 27 issued by the Secretary of Agriculture, August 5, 1938, pursuant to Public Act No. 10, 73 D Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937.

amounts of milk shipped to other states. The fact, itself, however, may not be denied.*

In New York the Bonding Law has been held constitutional**, but in Pennsylvania a similar requirement has been found to be "a burden upon interstate commerce" and therefore unconstitutional (R. p. 24). But any "burden" is not enough to invalidate the act. It must be an undue, and unreasonable one. It must be unnecessary and place an unreasonable restraint. For as was said in *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 225:

> "It being once admitted, as of course it must be, that not every law that affects commerce among the states is a regulation of it in a constitutional sense, nice distinctions are to be expected. Regulation and commerce among the States both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines."

However, if on this appeal the Pennsylvania determination is finally upheld, then, in so far as the bonding feature is involved, the outcome affects New York State.

History of the New York Bonding Law.

In 1913 the Agricultural Law was amended by adding a new section (§ 55) providing for the licensing of persons or corporations conducting the business of buying milk from dairymen for shipment as fluid or for manufacture into butter (Chapter 408 N. Y. Laws

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*Dealers with a principal office or place of business outside New York State buying milk from producers of this State have on file with the Commissioner bonds of a total value of $250,000. Nearly all of them have filed bonds since the enactment of the law.

Pennsylvania State College Bulletin, 327 (School of Agriculture and Experiment Station), published April, 1934, at p. 78 recites that in the month of April, 1934, 3,528,000 lbs. milk equivalent of milk and cream were shipped from New York to Pennsylvania dealers.

**As to corporations—People v. Beakes Dairy Company, 222 N. Y. 416. As to individuals—People v. Perretta, 253 N. Y. 305.

1913). As originally enacted no provision was made for guaranteeing payment to producers for the milk purchased. Enlarging upon Section 55, requirement of "a good and sufficient surety bond" became law two years later.* (Chapter 651 N. Y. Laws 1915; Report of the Pitcher Committee, N. Y. Legis. Doc. No. 114 of 1933 at page 360.)

The original bill (as to the bonding provision) was introduced in the Assembly on March 9, 1915 (Assembly Journal 1915, p. 785). It seems to have been referred to the Committee on Agriculture, amended, (p. 1427), recommitted, reported amended, (pp. 1656, 1992), again amended (p. 2108) and on April 19th. unanimously passed (pp. 2388, 2389). On April 22nd. the Senate unanimously passed it (Senate Journal 1915, p. 1615). On May 18th. it was approved by the Governor. This brief reference to its legislative career indicates, we think, a careful consideration of its merits

*As it appeared at that early date, the pertinent portion of the section read:

A license shall not be issued as provided in this section, on and after the taking effect of this section, unless the applicant for such license shall file with the application a good and sufficient surety bond, executed by a surety company, duly authorized to transact business in this state, in a sum not less than five thousand dollars, or shall be relieved from such requirement as provided herein. Such bond shall be approved as to its form and sufficiency by the commissioner of agriculture.

Such applicant may in lieu of such bond deposit with the commissioner of agriculture money or securities in which the trustees of a savings bank may invest the moneys deposited therein, as provided in the banking law, in an amount equal to the sum secured by the bond required to be filed as herein provided.

The bond required to be filed hereunder shall be given to the commissioner of agriculture in his official capacity and shall be conditioned for the faithful compliance by the licensee with the provisions of this chapter, as hereby amended, and for the payment of all amounts due to persons who have sold milk or cream to such licensee, during the period that the license is in force. The money or securities deposited with the commissioner of agriculture, as above provided, shall constitute a separate fund and shall be held in trust for, and applied exclusively to, the payment of claims against the licensee making such deposit, arising from the sale of milk or cream to such licensee.

Upon default by the licensee in the payment of any money due for the purchase of milk or cream, which payment is secured by a bond or the deposit of money or securities as hereinbefore provided for, the creditor may file with the commissioner of agriculture, upon a form prescribed by him, a verified statement of his claim. If such creditor shall have reduced such claim to judgment or shall thereafter and before the commencement of the action by the commissioner of agriculture, as hereinafter provided for, reduce such claim to judgment, a transcript of such judgment shall also be filed with such commissioner.

by a public body having complete facilities for investigation. The Legislature must be presumed to have recognized an urgent evil, and indeed subsequent events have proven the statute's worth.

The bond requirement was soon attacked as unconstitutional. In June of 1916 the People had begun under amended Section 55 an action for injunction against the Beakes Dairy Company (222 N. Y. 416). The defendant demurred, raising the question of unconstitutionality. We mention the case at this point because when it came on to be heard by the Court of Appeals, the Attorney General filed a brief which explained the reason and necessity for the bonding amendment. It was urged (p. 32) that "some milk gatherers who ship their milk to cities may be honest and will pay the farmer for his milk, nevertheless it has been proved that frauds have been perpetrated to such an extent throughout the State and upon a particular class of persons as to justify a licensing and bonding restriction of general application even though milk gathering seems at first glance to be an ordinary business not more susceptible to fraud than many others". By way of proving this conclusion, the Attorney General had illustrated losses which occurred in a single county of the State. In order to demonstrate that they were not imaginary, we quote from pages 26 and 27 of the brief. (*People v. Beakes Dairy Company.* Cases and Briefs. New York Court of Appeals, 222 N. Y. 410-437. New York State Law Library, State Education Bldg., Albany, N. Y.).

> "Taking the county of Delaware alone, the following milk gathering concerns ceased to do business, owing the farmers in the vicinity the amount thereinafter set forth:

"The Shavertown Creamery Company at Shavertown, Delaware county, ceased business owing the farmers in the neighborhood who supplied milk to the company the sum of $15,000.

"Henry Huebe, a New York City dealer, operated a creamery or purchased milk in the town of Walton and ceased doing business owing the farmers $5,000.

"J. J. Clancy, also from New York, operated a creamery at Frasers, and stopped business owing the farmers $8,000.

"The Metropolitan Dairy Company, with headquarters in New York, operated a creamery at Colchester and shut down its plant owing the farmers $7,000.

"Louis Kadans, a New York dealer, operated creameries at Arkville and left owing the farmers $10,000.

"Walker & Mead of Shavertown failed with liabilities of $5,000.

"G. E. Manzer closed his creamery at Sidney Center owing the farmers $9,000.

"Franklin Creamery Company at Franklin, Delaware county, left liabilities of $9,000 for milk purchased.

"The Dairy Products Company, with its principal creamery at Bainbridge, ceased business owing the farmers an amount approximately $50,000.

"William Stringer of Treadwell, Delaware county, owed the farmers when he failed $3,000 or $4,000.

"E. E. Sweet Creamery Company of Sidney failed owing the farmers a considerable amount for milk.

"The Liberman Dairy Company, New York dealers operating in Delaware county, whom the State is now suing, owes the farmers $15,000.

"Fraudulent and unscrupulous buyers abounded everywhere, and though the farmer could have saved himself from fraud and loss by refusing to sell except for cash, it still was within the legislative power to protect a great class of people from the follies of their own ignorance *(Dent v. Virginia,* 129 U. S. 114, 122)."

Milk continued to disturb the legislative mind. During the session of 1916 the New York Senate and Assembly adopted a joint resolution appointing a joint legislative committee to investigate the condition of the State's agriculture. Because Senator Charles W. Wicks was chairman, the committee was commonly referred to by his name. Under date of February 15, 1917, a preliminary report was made. (Joint Legis. Comm. on Dairy Products, Live Stock and Poultry, N. Y. Legis. Doc. No. 35 of 1917.) After commenting that the enactment of the law "was induced by the common knowledge that dairymen in many sections of the State from time to time, became the prey of men without financial responsibility, who could secure for a time, possession and control of a shipping station," or could "suffer tremendous losses because of the honest failure of men engaged in business," the report said (p. 607):

"If a survey could be made extending back fifteen years, it would probably be difficult to find a county in the State where the dairymen have not lost many thousands of dollars from such operations. The failure to receive any pay for milk produced for as long a period as two or three months has been very frequent. Such a result is a disaster of considerable magnitude to the ordinary farming community. The loss to the owner of the farm

> is serious enough, but the situation of the tenant farmer dependent for his daily bread upon the milk check, is far more so when the milk company becomes insolvent or the fraudulent operator disappears with the proceeds of two or three months' milk. This situation is too well known to require extended comment."

It is impossible, however, for the producer to sell his milk for cash since the custom in the industry is to buy now and pay later on the basis of utilization. For as was said by Mr. Justice Pound in *People v. Perretta* (253 N. Y. 305 at 310):

> "It is apparently recognized as impracticable that the payments should be made to the farmer upon the delivery of each sale of milk." • • •

> "The producer of milk for the city market desires to find a ready purchaser near at hand to take his product from the source of supply to the point of consumption. He cannot peddle his product from door to door or hold it to await a rise in market prices or a cash purchaser. He must sell it to milk gatherers; deliver it fresh and often on credit. Such are the conditions of the market peculiar to the handling of milk."

The bonding statute was indeed an agency for good. That it produced commendable results is evidenced by the annual report of the Department of Agriculture and Markets transmitted to the Governor and the Legislature for the calendar year 1929 (N. Y. Legis. Doc. No. 37 of 1930). The following table appearing at page 34 of that report shows the number of defalcations, the amount of claims and the monies collected for and distributed to producers over the period 1918-1929.

Year	"Number of forfeitures	Total amount producers' claims	Amount paid on claims
1918.....	1	$ 1,767.25	$ 1,767.25
1920.....	1	22,970.07	22,970.07
1921.....	5	62,973.18	42,245.33
1924.....	1	18,318.48	5,000.00
1925.....	1	18,132.22	5,000.00
1927.....	2	7,906.57	7,013.18
1928.....	5	20,830.62	15,966.78
1929.....	5	46,827.12	17,176.81
		$199,725.51	$137,139.42"

At page 11 of his brief filed with the Court of Appeals in the Perretta case, *supra*, the Attorney General having previously directed attention to the losses set forth for Delaware County in the Beakes case, *supra*, observed with respect to the table above: (Cases and Briefs, New York Court of Appeals, 253 N. Y. 305-324, New York State Law Library, State Education Building, Albany, N. Y.)

> "This table covers the years 1918 to 1929, both inclusive, and therefore covers a period of twelve full years. It appears therefrom that in these twelve years there have been but twenty-one forfeitures upon bonds, and that the producers have suffered a loss of but approximately $60,000, where they would have lost very nearly $200,000 without the protection of the statute. Furthermore, this is for the entire State of New York. It shows that for the entire State the loss is but slightly more than the amount admitted by the attorney for the Beakes Dairy to have been the loss for the County of Delaware alone, during a period prior to the enactment of the statute."

During the year 1922, section 55 of the old Agricultural Law was transferred to the Farms and Markets Law, becoming Article 21 thereof. (Ch. 48 N. Y. Laws of 1922.) No change was made in the bonding provision as quoted by footnote at page 6 herein, except

that the "Commissioner of Agriculture" was discontinued and mention is thereafter made merely to the "Commissioner." In 1927, the title of the "Farms and Markets Law" was amended to that of "Agriculture and Markets" (Ch. 207 N. Y. Laws of 1927). By chapter 416 of the laws of that year, Article 21 was amended. The bonding provisions then appeared as section 252 and 253. These were the sections under attack in the Perretta case, *supra* (1930). They read as follows:

> "§ 252. *Definition; licenses; application.* When used in this chapter, the terms 'milk gathering station,' 'manufactory' or 'plant' shall include a place where milk or cream is received from producers for sale or resale or for manufacture, with or without facilities or equipment for the preparation of milk or cream for market or for manufacture; and shall also include an office or other place of business where milk or cream is purchased from producers for sale or resale or for manufacture, with or without physical facilities in connection therewith for the receiving or the physical handling of milk or cream.
>
> "No person or corporation buying milk or cream from producers shall operate a milk gathering station, manufactory or plant where milk or cream is received or purchased from producers for sale or resale, or for manufacture, unless licensed by the commissioner. Application, upon a form prescribed by the commissioner, shall be made on or before August first in each year, for the license year beginning September first following. The applicant shall satisfy the commissioner of his or its character, financial responsibility and good faith in seeking to operate a milk gathering station, manufactory or plant. The commissioner if so satisfied shall issue to such applicant, on payment of ten dollars, a license entitling the applicant to operate milk gathering stations, manufactories or plants within the state until the first day of September next following. The license may des-

ignate the place or places where such milk gathering stations, manufactories or plants are to be operated. A license shall not be issued unless the applicant shall execute and file with the application a bond, or shall be relieved from filing of bond as provided in the next section."

"§ 253. *Bond; form; enforcement of.* The bond required by the last section shall be upon a form prescribed by the commissioner, shall be in the sum of not less than five thousand dollars, shall be executed by a surety company authorized to do business in this state, and shall be conditioned for the faithful compliance by the licensee with the provisions of this chapter, and for the prompt payment of all amounts due to producers who have sold milk or cream to such licensee, during the period that the license is in force. The bond shall be approved by the commissioner.

"Upon default by the licensee in the payment of any money due for the purchase of milk or cream, the creditor may file with the commissioner, upon a form prescribed by him, a verified statement of his claim. If such creditor shall have reduced such claim to judgment or shall thereafter reduce such claim to judgment, a transcript of such judgment shall also be filed with the commissioner.

"Upon default by the licensee in any of the conditions of the bond, an action upon the bond shall be brought by the commissioner. All moneys collected upon such bond shall be applied by the commissioner, first, to the payment ratably of all verified claims promptly filed with the commissioner after reasonable notice to present claims arising during the license period in connection with which the bond was given and the balance shall be paid into the state treasury.

"A licensee shall from time to time, when required by the commissioner, make and file with the commissioner a verified statement of his or its disbursements during a period to be prescribed by the commissioner, containing the names of the producers from whom milk and cream were pur-

chased, and the amount due to the vendors thereof. If it appears from such statement or from facts otherwise ascertained by the commissioner that the security afforded to producers selling milk and cream to such licensee by the bond does not adequately protect such producers, the commissioner may require such licensee to give an additional bond in a sum to be determined by the commissioner, but not exceeding by more than twenty-five per centum the value of the maximum amount of milk and cream purchased from producers in any one month, and not exceeding in any event one hundred thousand dollars.

"If the applicant for a license under this section be a person or a domestic corporation, the commissioner may, if satisfied from an investigation of the financial condition of the applicant that the applicant is solvent and possessed of sufficient assets to reasonably assure compensation to probable creditors, by an order filed in the department, relieve such person or corporation from the provisions of this section requiring the filing of a bond."

In 1934 (one year after the enactment of the emergency milk control statute of 1933*) the bonding provisions of sections 252 and 253 were combined with the licensing features of Article 25 to create the present Article 21 (Ch. 126 N. Y. Laws of 1934 as incidentally amended by ch. 401, 1935, and ch. 409, 1937).

From almost the beginning of this long history of protective legislation bonds have been required from out of state milk dealers purchasing milk from New York producers.

Official Interpretation of Statute.

Throughout this extended period those charged with the administration of the law officially interpreted it as

*Article 25, Agriculture and Markets Law. See Nebbia v. New York, 291 U. S. 502, 515 and footnotes pages 518 and 519.

applicable to all milk dealers buying milk within the State from New York producers. In the September 1918 issue of "Foods and Markets", published monthly by the then Division of Foods and Markets of the Department of Farms and Markets, the following explanation appears at page 15:

> *"Milk Dealers are Bonded*
>
> "All persons, firms, or corporations who purchase milk from farmers for shipping to a city or manufacturing are required to obtain a license at a cost of ten dollars and file a surety company bond or other security satisfactory to the Commissioner of Foods and Markets."

In the December 1920 issue of "Foods and Markets", the Division published (p. 9) a "List of Licensed Milk Dealers", arranged by counties. In Rensselaer County, (p. 23) of five dealers listed, one is out state dealer. This is not true of every county given, but, of course, there were in other counties dealers shown having out of state addresses. We refer to H. P. Hood & Sons, Inc., because that corporation still files a bond and, according to department records, has done so since 1917.

"Name of Dealer	*Address*	*Milk gathering stations*
	RENSSELAER COUNTY	
H. P. Hood & Sons Inc.	494 Rutherford Ave., Charlestown, Mass.	Eagle Bridge West Hoosick
Hoosick, N. Y. Elgin System Creamery Association	Hoosick, N. Y.	Hoosick
Normanskill Farm Dairy Co.	120 South Swan St., Albany, N. Y.	Berlin
Sheffield Farms Co., Inc.	524 West 57th St., New York City	Nassau Stephentown
D. Whiting & Sons	Greenwich, N. Y.	Johnsonville."

New York Decisions.

The first test of the New York requirement was in the case of *People of the State of New York v. Beakes Dairy Company*, 179 A. D. 942; 222 N. Y. 416. The State brought suit to recover judgment for violations of Section 55 of the Agricultural Law on the ground that the defendant was buying milk from producers for shipment to New York City without first having obtained a license from the Commissioner of Agriculture. The Special Term denied defendant's application for judgment upon its demurrer whereby two questions were raised: (1) the constitutionality of the statute and (2) that no civil penalty action was provided by the statute. The State sought judgment against defendant for two hundred and ninety-eight penalties of one hundred dollars each.

The Appellate Division of the Third Judicial Department reversed the Special Term "on the ground that the purpose of the statute is to secure payment for the purchase price of merchandise, and is class legislation and not a valid exercise of the police power." The presiding justice dissented with a written opinion (179 A. D. 942) in which he said (p. 943):

> "It is vital to the public welfare that the cities of the State be supplied with pure and wholesome milk. It is of the utmost importance to the public welfare that the farmers should be induced to produce milk for use in the cities and that the persons purchasing and shipping milk for city use shall be responsible persons so that the seller shall receive pay for his milk. It is a fact too well known to need discussion that the farming community has suffered great damage by irresponsible persons buying on credit their milk for shipment to the large cities without paying therefor.

Such transactions naturally tend to convince the farmer that it is better for him to limit his production of milk or take it to the home factory to be manufactured there, dealing with people whom he knows rather than to sell it for city use. It is apparently recognized as impracticable that the payments should be made to the farmer upon the delivery of each sale of milk. When a person seeks to buy milk from the farmers of the State to ship to the cities of the State for use and consumption, his transactions affect the public interest, and the welfare of the farming community means the welfare of the public, and the State may properly protect the farmer from irresponsible dealers who seek his milk for shipment to the cities. This law, as we have indicated, has more than one aspect. It naturally benefits the farmers, but it guarantees the city a supply of milk. The farmer is not naturally a financier, and when he produces the milk he should be reasonably assured that he is to have its value, and the State may prevent irresponsible people from taking away his milk without giving some reasonable surety that it will be paid for. In the absence of some such provision, the shipment of milk to the cities would fall off and be greatly limited. It is unnecessary to cite the many cases sustaining statutes providing for licensing or regulations of the various trades, businesses and professions in the interests of the public welfare. We conclude this statute is a proper exercise of the police power of the State and is valid. 'It may be said in a general way that the police power extends to all the great public needs. *(Camfield v. United States,* 167 U. S. 518.) It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the pos-

> sibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If then the Legislature of the State thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it.' *(Noble State Bank v. Haskell,* 219 U. S. 104, 111; *Assaria State Bank v. Dolley, Id.* 121.)"

On appeal to the Court of Appeals (222 N. Y. 416) it was held (p. 425) that "the complaint does not state facts constituting two hundred and ninety-eight causes of action, neither does it state facts constituting one cause of action." The judgment of the Appellate Division was therefore affirmed on that ground alone. At the same time, however, the law was held constitutional as applied to a domestic corporation (pp. 431-433).

In the Beakes case, it should be noted, the question was not presented whether the statute was valid as an exercise of the police power of the state over individuals (222 N. Y. 416 at 429). That issue came up for decision in *People of the State of New York v. Perretta,* 253 N. Y. 305. The State sued for a one hundred dollar penalty because the defendant had operated a milk gathering station without the license required by the then Agriculture and Markets Law section 252* (Ch. 416, N. Y. Laws of 1927). Upon motion of the defendant, the complaints (there were two actions) were dismissed by the Supreme Court, it be-

*The applicant shall satisfy the commissioner of his or its character, financial responsibility and good faith in seeking to operate a milk gathering station, manufactory or plant. The commissioner if so satisfied shall issue to such applicant, on payment of ten dollars, a license entitling the applicant to operate milk gathering stations, manufactories or plants within the state until the first day of September next following. The license may designate the place or places where such milk gathering stations, manufactories or plants are to be operated. A license shall not be issued unless the applicant shall execute and file with the application a bond, or shall be relieved from filing of bond as provided in the next section.

ing held that the act in question was unconstitutional under Federal and State Constitutions (134 Misc. 652).

The Appellate Division of the Fourth Judicial Department affirmed the dismissal. Here again, there was a dissent by the presiding justice, who, after a discussion of the Court of Appeals opinion in the Beakes case, said: (228 A. D. 420 at 425)

> "Aside from the authority of the *Beakes Dairy Co.* case, I reach the same result. Milk producers, very generally, live in localities where the principal, if not the only reasonable outlet of their product is that of the receiving plant of the middlemen. Their choice of customers is, therefore, restricted. The opportunity to learn of the financial responsibility and standing of the purchaser of the dairy product is slight. The failure of such middlemen to meet their obligations to milk producers is indicated by the legislation to be an evil prejudicial to the interests of the State. The production of milk is of vital concern to the people. Uncertainty of payment under the circumstances might be expected to curtail its production. The Legislature finding here an evil has taken steps to check it. I may, of course, doubt whether such an evil exists. I cannot say with any fair degree of certainty that such an evil does not exist, or that reasonable men may not think so. All such matters are primarily for the consideration of the Legislature. We should not pronounce such a statute unconstitutional unless we can say with a fair degree of certainty that reasonable men may not here find an actual evil."

The Court of Appeals, in its turn, reversed the lower Courts. Said Mr. Justice Pound, writing the opinion of the court: (253 N. Y. 305 at 308, 309)

> "In brief, the law limits the right of persons or corporations to conduct milk-gathering stations as

defined by the act to those of approved character, financial responsibility and good faith, licensed by the Commissioner for the purpose, after giving an approved bond to secure the prompt payment of all amounts due to producers or, in lieu thereof, satisfying the Commissioner of their ability to pay probable creditors.

"This act is, in substance, the re-enactment of a former law which was before the court for consideration in *People v. Beakes Dairy Co.* (222 N. Y. 416; annotated, 3 A. L. R. 1271) and was there upheld as a proper regulation of the reserved power to amend the charters of domestic corporations, expressly reserving the question of the power of the Legislature thus to regulate the business of individuals. A corporation is a person and as such is entitled to the equal protection of the laws (*Liggett Co. v. Baldridge*, 278 U. S. 105) and if the legislation is a competent exercise of legislative power over corporations, it would seem that it is also a proper exercise of such power over individuals. (*Matter of Mount Sinai Hospital*, 250 N. Y. 103.)

"The police power is 'the least limitable of the powers of government.' (*District of Columbia v. Brooke*, 214 U. S. 138, 149.) It extends to all the great public needs. (*Camfield v. United States*, 167 U. S. 518.) The validity of police regulations must depend on the circumstances of each case and the character of the regulation, whether arbitrary or reasonable. A legitimate public purpose may always be served without regard to the constitutional limitations of due process and equal protection. (*People ex rel. Durham Realty Co. v. La Fetra*, 230 N. Y. 429; *New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63.)

"The Legislature has a wide discretion in protecting the public from the dishonest or irresponsible. (*Roman v. Lobe*, 243 N. Y. 51; *People v. Teuscher*, 248 N. Y. 454.) The question is how to apply the test. Is it a public evil to permit irresponsible persons and corporations to operate

milk-gathering stations although they may engage in many other legal callings at will? If so, milk gatherers may be put into a particular class. (*New York ex rel. Bryant v. Zimmerman, supra.*)"

The dissenting opinion in the Beakes case, *supra*, is then quoted, after which, the opinion continues (pps. 310, 311, 312 and 313):

"The producer of milk for the city market desires to find a ready purchaser near at hand to take his product from the source of supply to the point of consumption. He cannot peddle his product from door to door or hold it to await a rise in market prices or a cash purchaser. He must sell it to milk gatherers; deliver it fresh and often on credit. Such are the conditions of the market peculiar to the handling of milk. The law deals with a definite class, *i. e.*, the milk gatherers. It is not wholly for the benefit of the farmer. If it gives him 'a club to aid in the collection of debts which is not given to other creditors' (*State of Maine v. Latham*, 115 Me. 176), it gives it to him to keep open the stream of milk flowing from farm to city as well as to guard him from financial loss.

"When the Legislature takes notice of the dependency of the city on the farm and of the hard and often unremunerative character of farm life, we think it may protect the farmer from fraud arising from the peculiar conditions under which milk is produced and sold.

"That the evil is not imaginary or local is evidenced by the like legislation of other States as follows: Connecticut: L. 1919, ch. 194; Maine: L. 1915, ch. 32; Minnesota: L. 1927, ch. 427; New Hampshire: Public Laws, ch. 164 as amd. by L. 1929, ch. 35; New Jersey: L. 1917, ch. 74; Rhode Island: General Laws (1923), ch. 204; Vermont: General Laws (1917), ch. 239, §5727, as amd. by L. 1923, No. 103; L. 1929, Nos. 105, 106; Wisconsin: L. 1925, ch. 389, §1 (Statutes Wis. (1925), §99.32).

"The Connecticut statute was declared unconstitutional as class legislation in *State v. Porter* (94 Conn. 639). The Wisconsin act and the Maine act vary in detail from the New York statute but they have also been held unconstitutional for like reasons in *State ex rel. Hickey v. Levitan* (190 Wis. 646) and *State of Maine v. Latham* (*supra*). The reasoning in these cases rests on the abstract doctrine of liberty of contract rather than the practical necessities of the case. The Supreme Court of the United States in *Payne v. Kansas* (248 U. S. 112, followed in *Arnold v. Hanna*, 276 U. S. 591, affg. 315 Mo. 823) had before it a State law forbidding the sale of farm produce on commission without an annual license obtained on a proper showing of character, responsibility, etc., and a bond conditioned to make honest accounting. The court said with directness and brevity: 'Plaintiffs in error maintain that the statute is class legislation which abridges their rights and privileges, that it deprives them of the equal protection of the laws and also of their property without due process of law—all in violation of the Fourteenth Amendment.

"'Manifestly, the purpose of the State was to prevent certain evils incident to the business of commission merchants in farm products by regulating it. Many former opinions have pointed out the limitations upon powers of the States concerning matters of this kind, and we think the present record fails to show that these limitations have been transcended. *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342; *Brazee v. Michigan*, 241 U. S. 340; *Adams v. Tanner*, 244 U. S. 590.'

"A legalistic distinction exists between the merchant who handles farm produce on commission and the milk gatherer who buys milk on credit from the farmer. One acts as agent for a principal. The other is a mere debtor. The legal difference in the evil results of the dishonesty or irresponsibility of the agent and of the debtor may be readily discernible to a lawyer. He would say

that a fiduciary may expect to secure his *cestui que trust*. With the farmer, the obvious result of dishonesty or irresponsibility in both cases would be the loss of the return on his farm products by a bad system of marketing. When the product in question is milk, the choice of evils between the commission merchant and the milk gatherer is reduced to the vanishing point. As the law is thus read, the requirement of a bond to secure the payment to producers is a concession rather than a burden. It applies only to those of doubtful integrity and financial responsibility. Others may obtain exemption. Doubtless a license may be required. Many trades and callings are open only to those who are licensed to pursue them. If the calling is so innocent that it must be left open to all alike the State may not require a license. If, on the other hand, the dishonest and unworthy should not be permitted to take advantage of the opportunities presented by a given trade or calling, they may be 'told to stand aside.' (*Roman v. Lobe, supra*, p. 54; *Bendell v. De Dominicis*, 251 N. Y. 305, 310.)

"When the Legislature has power to act, it may act without interference from the courts. The Legislature has, we find, acted on reasonable grounds and in a reasonable manner."

The lower Courts have followed these decisions. In *Ten Eyck v. Eastern Farm Products, Inc.*, 160 Misc. 402, the Commissioner of Agriculture and Markets made an application for an order enjoining the defendant *pendente lite* from buying milk from producers for resale without a surety bond. There were other questions (p. 405) raised as to the effect of *Baldwin v. G. A. F. Seelig*, 294 U. S. 511, on certain then existing price fixing provisions in the Agriculture and Markets Law*

*These provisions were temporary and have since expired. Retail milk prices are no longer established by law in New York. Payments to producers may be fixed by Order or Agreement under chapter 383 N. Y. Laws of 1937 or in co-operation with the Federal Government.

but they do not have any bearing on the point for which the case is cited.

> "It is asserted by the defendant," said the court (p. 403), "that grave doubts exist as to the constitutionality of the so-called Milk Control Law in view of the decision in *Baldwin v. G. A. F. Seelig*, (294 U. S. 511). Such doubts are not apparent unless one takes the view that the courts of ultimate appeal will completely reverse themselves. (*Nebbia v. New York*, 291 U. S. 502; *Hegeman Farms Corp. v. Baldwin*, 293 *id.* 305.) But irrespective of one's view as to the price fixing part of the statute the principle that the State may require a bond from a milk dealer as a prerequisite to doing business is firmly established. (*People v. Perretta*, 253 N. Y. 305.) As pointed out this requirement antedates emergency legislation, in principle at least if not in detail.
>
> "With the wisdom or expediency of such legislation courts are not concerned. The question of constitutionality is a question of power. This is not to say that the plaintiff has the right to act capriciously and arbitrarily in exacting a bond which amounts to confiscation. From the information disclosed on these papers it cannot be justly said that the plaintiff has abused his discretionary power. The bond required appears to be fairly commensurate, within reasonable limits, to amount of business concededly done. The answer of the defendant that it cannot furnish such a bond is not sufficient. Such an answer might be made in any case."

Temporary injunction was granted and defendant appealed to the Appellate Division for the Third Judicial District, where it was held on authority of *People v. Perretta, supra*, that "The right of the plaintiff* to require a bond is unquestionable" (249 A. D. 891). Reargument and leave to appeal to the Court of Appeals were both denied. (250 A. D. 798.)

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*The Commissioner of Agriculture and Markets of the State of New York.

Statutes in Other Jurisdictions.

In addition to New York and Pennsylvania, several other states of the Union have laws relating to the bonding of milk dealers purchasing milk from producers. The regulation of the business of creamery companies in their dealings with milk producers has been a subject of legislation in VERMONT for many years. *Chapter 196 of the Public Laws as amended by 101 of the Acts of 1935 as amended by No. 97 and No. 98 of the Acts of 1937.* The history of this subject in the State of Vermont is informatively set forth in the case of *Clifford v. West Hartford Creamery Co., Inc.*, 103 Vt. 229 at 253 from which we quote:

> "Chapter 239 of the General Laws provides for the licensing of a creamery company and the furnishing of security by it to secure the payment of its patrons' accounts, before it does business in this State. It is not necessary to consider in detail all of the legislation upon this subject. A brief history of the development of the same and reference to some of its important features is sufficient.
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> "Act No. 138 of the Laws of 1906, which became Chapter 211 of the Public Statutes in the revision of 1906, provided for the licensing of foreign creamery companies before they did business in this State, and further provided that if the commissioners were satisfied that a company was not safe and entitled to public confidence, they should, before granting a license, require it to furnish a bond conditioned for the payment of all sums recovered against it. There were no provisions as to the legal proceedings to be brought, or by whom, if there was a breach of its bond by a company by its failure to pay the sums due its patrons.
>
> "Act No. 181 of the Laws of 1912 amended some of the sections of said Chapter 211, and also contained additional legislation on the subject-matter,

which was made a part of said chapter. The amendments, so far as material, provided that before a license was issued to a company, the commissioners should require it to file a surety bond for the benefit of its patrons.

"The additional legislation provided that, in the absence of an agreement in respect thereto, payments by a company should become due and payable on the fifteenth of each month for all milk and cream furnished or delivered to it by its patrons during the preceding calendar month. It also provided that if a company for ten days after they became due failed to pay its patrons the several amounts due them for milk and cream, it should be in default as to all patrons whose milk and cream accounts were unpaid in full, and its bond should be forfeited to the extent of all sums then due to its patrons in this State. It further provided that the bond required by the chapter should be given to the commissioners as trustees of the company furnishing the same, for each and all of its patrons in this State, and that upon breach of condition by failure of the company to pay its patrons' accounts, the commissioners, upon application by a patron having an unpaid account, should institute appropriate proceedings on the bond in their names as trustees for the benefit of all patrons of such company to whom it might be indebted at the time such proceedings should be instituted.

"Said Chapter 211 was amended again by Act No. 168 of the Laws of 1915, which also contained additional legislation that was made a part of the chapter. This act abolished the distinction between foreign and domestic creamery companies as to being licensed and bonded, and provided that all companies, as defined by section 1, should be licensed before doing business in this State.

"The amendments, so far as material, provided that before issuing a license, the commissioners might require a company to furnish a bond, or they might accept, in lieu of such bond, such security by

way of mortgage or otherwise as they deemed sufficient; that the same should be taken for the *sole* benefit of patrons in this State of such company; and, if a company paid its patrons weekly or bimonthly, such fact should be taken into consideration by the commissioners in determining the amount of bond or other security that such company should be required to furnish.

"The additional legislation is now contained in G. L. 5732, the contents of which are hereinbefore given, and in G. L. 5736, which provides that a company shall not be required to file a bond or give security if all of its patrons consent in writing that the same need not be given.

"Said Chapter 211, as amended by said Acts of 1912 and 1915, became Chapter 239 of the General Laws in the revision of 1917.

"It is apparent that all of these acts we have considered have but one object in view—the protection of producers of milk and cream in their dealings with creamery companies. That there was a necessity for such legislation is evident when it is borne in mind that the creamery companies and the producers do not deal with each other on equal terms; that the advantage has always been with the companies. It is the company that weighs the milk and cream of the producer; that tests it for the butter fat content upon which the price paid for it is based; and that fixes the price paid for the milk and cream received by it. Before the enactment of the provisions of Chapter 239, it was only by litigation by the individual producer that he could collect what was due him, if he collected at all, when a creamery company refused or failed to pay him for his milk and cream. The unfortunate experiences of producers with creamery companies in these respects presented an evil which the Legislature sought to correct by this legislation."

CALIFORNIA provides for milk bonding in section 737.5 of the Agricultural Code (1937 Deering) paragraph b*, its language, by the way, quite similar to that of the New York requirement. The petitioner, in *Ex parte Willing*, C. R. 1638—District Court of Appeal, 3rd Dist., California [June 29, 1938] 80 Pac. 2nd 1027 at 1028 and 1029, "was arrested for failure to comply with section 737.5 of the Agricultural Code of the State of California, St. 1933, p. 60 added by 1935, p. 928 amended by St. 1937, p. 50 in that he engaged as a purchaser and distributor of fluid milk, etc., without first having obtained a license therefor, and giving a bond provided for in the section just referred to."

Question was raised as to the constitutionality of the section involved upon the ground that section 737.12

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*Section 737.5 Calif. Agricultural Code (1937 Deering) paragraph b.

(b) **Bond.** Before any license is issued to any distributor who purchases fluid milk or fluid cream from producers, the applicant shall execute and deliver to the director a surety bond in the minimum sum of $1,000.00, executed by the applicant as principal and by a surety company qualified and authorized to do business in this State as surety. Said bond shall be upon a form approved by the director, and shall be conditioned upon the payment in the manner required by this chapter, of all amounts due to producers for fluid milk and fluid cream purchased by such licensee or applicant during the license year. Said bond shall be to the State in favor of every producer of fluid milk and fluid cream. In case of failure by a distributor to pay any producer or producers for fluid milk or fluid cream in the manner required by this chapter, the director shall proceed forthwith to ascertain the names and addresses of all producer-creditors of such distributor, together with the amounts due and owing to them and each of them by such distributor, and shall request all such producer-creditors to file a verified statement of their respective claims with the director. Thereupon the director shall bring an action on the bond on behalf of said producer-creditors. Upon any action being commenced upon said bond, the director may require the filing of a new bond, and immediately upon a recovery from any action upon such bond, such distributor shall file a new bond, and upon failure to file the same within ten days in either case, such failure shall constitute grounds for the revocation or suspension of the license of such distributor. In the event the recovery upon the bond is not sufficient to pay all of the claims as finally determined and adjudged by the court, any such amount recovered shall be divided pro-rata among said producer-creditors.

Amount of bond. The minimum bond of $1,000.00 shall be required of distributors purchasing an average daily quantity of fluid milk not to exceed 100 gallons; distributors purchasing an average daily quantity of 100 gallons and less than 200 gallons must post a bond in the amount of $2,000.00; distributors purchasing an average daily quantity of 200 gallons and less than 300 gallons must post a bond in the amount of $3,000.00; distributors purchasing an average daily quantity of 300 gallons or more shall post a bond in the sum of $5,000.00.

Additional bond. In the event that any distributor so increases his purchases of fluid milk or fluid cream during the license year that said purchases exceed the amount for which said distributor is bonded, said distributor shall forthwith post such additional bond or bonds as may be required to comply with the provisions of this section. [Added by Stats 1935, p. 928; Amended by Stats. 1937, p. 50.]

of the same code exempting retail stores as defined, rendered discriminatory the licensing and bonding provisions relative to distributors.

> "It is admitted", said the court, "that the police powers of the state authorize the legislature to legislate on the subject of production, processing and distribution of fluid milk and fluid cream, in order that a pure product may be furnished to the consumer, and that the producer may be safeguarded against irresponsible persons who engage in business as collector-distributor. An analysis of the business carried on by collector-distributors, and the manner of conducting business by grocery stores, etc., furnishes a clear exposition of a basis warranting separate classification. The collector-distributor goes to the producer at his dairy barn and obtains so many gallons of milk from the producer, already placed in cans by the producer, conveys the same to a plant where that milk is pasteurized or processed and made fit for human consumption, and the butterfat content contained therein ascertained and determined. The collector-distributor pays nothing to the producer at the time of the collection of the cans containing so many gallons of milk, but after the gallons of milk contained in the cans are pasteurized or processed, and the butterfat contained therein ascertained, a report is made by the collector-distributor to the producer, stating the same, and then, by mathematical calculation, the value of the gallons of milk delivered by the producer to the collector-distributor is made certain, and the amount of the indebtedness of one to the other established. The collector-distributor then takes the milk and distributes it among his customers, so many bottles or cases to one establishment and so many to another, and likewise distributes to consumers, morning after morning, so many bottles of milk fit for human consumption."

The petition was denied and the proceedings dismissed. We have been advised however that hearing has been granted by the Supreme Court.

For complete discussion of the California Bonding Law see *Brock v. Valley Dairy Company,* Aug. 3, 1937, Los Angeles County Superior Court, upholding the act and relying upon *People v. Perry,* 212 Cal. 186; 298 Pac. 19.

INDIANA's Milk Control Law (Acts 1935, p. 1365) provides by section 7 as amended by Acts 1937, (official) p. 1087, that each milk dealer as defined by the act shall apply to the Milk Control Board for a license to engage in business as a milk dealer as more fully defined by section 2 (f). The application must include certain prescribed information and be accompanied by (Section 7B; p. 1088):

> "(a) Either a bond in such form and amount as the board may prescribe, with surety satisfactory to the board, conditioned for the prompt payment of all obligations to producers when due; or a financial statement showing evidence satisfactory to the board to the effect that the applicant is of sufficient financial responsibility to insure prompt payment for sixty days' supply of milk."

Here again great similarity exists between the Indiana and New York laws for as was observed by the Indiana Supreme Court in *Albert v. Milk Control Board,* 200 N. E. 688, 698, "the Milk Control Act of Indiana is very similar and in many respects identical with the Milk Control Acts of New York and New Jersey. Doubtless the authors of the Indiana act had these acts before them when they wrote the Indiana act, and followed them to a large extent" (p. 698). The bond requirement does not seem to have been at issue in this case. The act as a whole and in so far as there assailed was upheld as within the State's police power.

At this writing, we are advised by the Attorney General of MASSACHUSETTS that there are no decisions

concerning that Commonwealth's milk dealers bonding requirement found as section 42A, Chapter 94, Annotated Laws of Massachusetts, Vol. 3. (Acts 1933 Ch. 338, sec.—2; 1935, Ch. 126) which in its present form so far as here pertinent reads:

> "• • • A license shall not be issued unless the applicant shall execute and file at the time of filing the application, or within such further time as the commissioner may allow, a bond or other security satisfactory to the commissioner or shall be relieved therefrom as provided in section forty-two E."

The bond, by section 42-B* is conditioned upon the prompt payment of all amounts due to producers for milk or cream sold by them to the licensee during the period for which application for license is made.

MINNESOTA, according to our best information, requires the bonding of creameries. Pursuant to 1 Mason Minn. St. 1927 (1938 Supplement), Section 6240—18½ b, wholesale dealers in produce must be licensed. Section 6240—18½-a defines the term "produce" to mean

*§42 B. Bond—The bond required by the preceding section shall be payable to the commissioner and shall be in a sum fixed by him. Said sum shall be substantially equivalent to the total purchase price, as determined by the commissioner, of milk and cream purchased by the applicant from Massachusetts producers in the average period between payments by him to producers during the three months immediately preceding the date of application for a license, plus ten per cent of such total purchase price, or, if the applicant is not then operating any milk plant or manufactory, shall be substantially equivalent to the total purchase price, as estimated by the commissioner, of milk and cream to be so purchased in the estimated average period between payments by the applicant to producers during the period for which the license is to issue, plus ten per cent thereof. Such bond shall be in a form prescribed by the commissioner and shall be executed by the applicant for a license and by a surety company authorized to do business in this commonwealth. It shall be upon the condition that the applicant, if granted a license, shall faithfully comply with the provisions of this chapter applicable to milk plants and manufactories, shall not give any cause for the revocation of his license under section forty-two H and shall promptly pay all amounts due to producers of milk or cream sold by them to him during the license period for which the application is made. In lieu of such bond, the commissioner may accept a note of like amount payable to him, secured by a mortgage of real estate on personal property, or both, or by a deposit of cash or collateral with him. Any such mortgage, or note secured by cash or collateral, shall be upon the same condition as is herein provided for a bond. Any cash or collateral deposited under this section or under section forty-two D shall be deposited by the commissioner with the state treasurer, who shall hold the same subject to section forty-two C. (1933, 338, §2, appvd. July 18, 1933.)

and include "the raw and finished products of the dairy, creamery, cheese factory." As a prerequisite of licensing, a bond conditioned for the payment when due of the purchased price of produce bought shall be filed with the Commissioner of Agriculture, Dairy and Food.*

In NEW HAMPSHIRE, every person who purchases milk or cream within the state to be resold as milk or cream or to be manufactured into other dairy products shall first obtain a license (Public Laws, Ch. 164, sec-

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*6240-18 ¼c, sub. (b) [sub. a, c and d deleted]

6240-18 ¼c. (b) The applicant shall execute and file with the Commissioner a bond to the State of Minnesota with securities to be approved by the Commissioner, the amount and form thereof to be fixed by the Commissioner, conditioned for the faithful performance of his duties as a dealer at wholesale, provided that any and all bonds heretofore executed and filed with the commissioner by dealers at wholesale containing substantially the requirements of this act are hereby confirmed and approved, for the observance of all laws relating to the carrying on of the business of a dealer at wholesale, for the payment when due of the purchase price of produce purchased by him when notice of default is given the commissioner within 30 days after the due date; provided that the bond shall not cover transactions wherein it appears to the commissioner that a voluntary extension of credit has been given on said produce by the seller to the licensee beyond the due date, for the prompt settlement and payment of all claims and charges due the State of Minnesota for services rendered or otherwise, for the prompt reporting of sales, as required by law, to all persons consigning produce to the licensee for sale on commission and the prompt payment to the persons entitled thereto of the proceeds of such sales, less lawful charges, disbursements and commissions. Such bonds shall cover all wholesale produce business transacted in whole or in part within the State of Minnesota, and the license, or a certified copy thereof, shall be kept posted in the office of the licensee at each place within the state where he transacts business. All licenses shall expire May 31 of each year. The fees for each license shall be $12.50, and for each certified copy thereof one dollar. Whenever the licensee shall sell, dispose of or discontinue his business during the lifetime of his license, he shall at the time such action is taken notify the Commissioner in writing, and shall upon demand produce before the Commissioner a full statement of all assets and liabilities as of the date of transfer or discontinuance of said business.

tion 1 as amended 1931 Ch. 4) and under certain circumstances give bond.*

NEW JERSEY by law provides that a milk dealer's license shall not be issued unless and until the applicant shall file "a good and sufficient surety bond" conditioned "for the payment of all amounts due to persons who have sold milk or cream to the licensee, during the period that the license is in force."**

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*Section 5—**Bond.** Any applicant, not having such real estate, shall be permitted to furnish security by a bond signed by such applicant and some surety company authorized to do business within this state, in such sum as the commissioner of agriculture shall fix, and conditioned upon the payment by the principal of all his accounts for milk or cream so purchased within this state, within fifteen days after the same shall become due, and for the faithful performance of and compliance with all the conditions and requirements imposed upon such dealers by the commissioner of agriculture or by the laws of the state. Such bond shall run to the state as trustee for the benefit of all residents of the state who may sell to the principal any of the aforesaid products. 1913, 220:2, 1919, 108:2.

Section: **5-a Waiver of Bond.** The commissioner of agriculture may waive the furnishing of the bond described in the preceding section if he is satisfied that the applicant is safe, reliable and entitled to confidence, provided that all of the producers in New Hampshire selling to such person declare in writing that such bond need not be given and such written agreement is duly executed and filed with the commissioner. (Amendment, 1929, Chapter 35. According to Public Laws 1926, Chapter 164, Section 1 as amended 1934, Chapter 4, persons making purchases from less than five producers exempted.)

**Revised Statutes of New Jersey (Official) Title 4 Chapter 12.

Section 4:12-2 **Licensing of dealers who buy for shipment, sale, resale or manufacture.** No person, unless exempted by the secretary as provided in this section, shall engage in or carry on the business of buying milk or cream in this state for shipment, sale, resale or manufacture, unless the business is regularly transacted or conducted at an office or station within the state and unless such person is duly licensed as provided in this article.

The secretary may, in his discretion, exempt from the provisions of this article any dealers who do not make purchases of milk or cream from more than two producers, or whose total monthly purchases do not exceed two hundred dollars.

Source. L. 1917, c. 74, §1, p. 133, as am. by L. 1918, c. 160, §1, p. 463 [1924 Suppl. §81-153 E (1)], L. 1935, c. 311 § 1 p. 986.

4:12-4 **Bond or deposit for protection of creditors.** A license shall not be issued unless and until the applicant shall file with the secretary a good and sufficient surety bond, executed by a surety company duly authorized to transact business in this state, in a sum not less than one and one-half times the estimated maximum monthly indebtedness of the applicant to the persons from whom he may purchase or receive, or may have purchased or received, milk or cream.

The bond shall be approved as to form and sufficiency by the secretary, shall be given to the secretary in his official capacity and shall be conditioned for the faithful compliance by the licensee with the provisions of this article and for the payment of all amounts due to persons who have sold milk or cream to the licensee, during the period that the license is in force.

The applicant may, in lieu of such bond, deposit with the secretary money, or United States government securities in an amount equal to the sum secured by the bond required to be filed.

The money or securities so deposited shall constitute a separate fund and shall be held in trust for, and applied exclusively to, the payment of claims against the licensee making the deposit, arising from the sale of milk or cream to him.

Source. L. 1917, c. 74, §1, p. 133, as am. by L. 1918, c. 160, §1, p. 463

The WISCONSIN Department of Agriculture and Markets may, by authority of Wisconsin Statutes, 1937, section 100.03, (4) (d) require an applicant or licensee to file a surety bond "conditioned for the prompt delivery of the price to producers."* This section is one of several constituting an emergency program. See *State ex rel. Finnegan v. Lincoln Dairy Company*, 221 Wis. 1, wherein section 100.03 is held valid since statute "deals with an industry subject to regulation under the law" and cannot be denounced as class legislation, citing *People v. Beakes Dairy Co.*, 222 N. Y. 416. (p. 13.)

In Canada, the Province of ONTARIO has a milk dealers bonding law, part and parcel of its Milk Control Act (Section 15, Ch. 76, Revised Statutes, 1937). We are advised by the Hon. P. M. Dewan, Minister of Agriculture, that the requirement has not been challenged although the act, itself, has successfully withstood attack. The attitude of the Provincial Government toward the program is aptly summed up in the 1937 Annual Report of the Department of Agriculture for the year ending March 31, 1937, wherein the following appears at page 110.

"BONDING OF REGULAR DISTRIBUTORS

"Closely associated with the question of licensing is the one of bonding milk distributors to guarantee their accounts with milk producers.

"Every distributor who buys more than one hundred dollars' worth of milk in a payment period and does not pay for the same at the end of

*Section 100.03 (4) (c)—The department shall issue license to each person making proper application and who is fit and equipped for the business. License may be denied, suspended or revoked by special order after notice and hearing as provided in section 93.18, when the applicant or licensee is unfit or unequipped for the business.

Section 100.03 (4) (d)—Under paragraph (c) the department shall consider, in addition to other matters, the character and conduct, including past compliance or noncompliance with law, of the applicant or any person to be connected with the business, and the financial responsibility of the applicant. The department may at any time require an applicant or licensee to file with it a surety bond conditioned for the prompt delivery of the price to producers.

each week is required to file a bond to cover the milk he has purchased.

"These bonds are mostly in the form of Government bonds or the bonds of Surety Companies and at the end of 1936 the following bonds were on deposit:

Bonds of Surety Companies	$ 776,390.73
Negotiable Securities	348,120.00
Total Bonds on file.....	$1,124,510.73

"The bonding requirement is considered by producers to be one of the most valuable features of the Act.

"Actually, it was not found necessary to call bonds for payment of accounts during 1936, but the restraining effect of the bond being on file saved producers large sums of money and encouraged prompt payments.

"In this connection it is worthy of note that since bonding requirements became effective, over thirty million dollars' worth of milk has been purchased by distributors and losses from unpaid accounts have been almost negligible, whereas in former times every few months a distributor would go into bankruptcy with losses of thousands of dollars to producers, or would just be unable to pay his producers and they, as ordinary creditors, had no effective protection.

"A further value of the bonding requirement was seen during the past three years but is no longer effective. When the Act was first passed, there were about two hundred distributors in the Province who could not secure a bond and who owed producers large arrearages. Rather than be unable to secure licenses, these operators commenced paying for current milk receipts on a weekly basis and agreed to reduce their arrearages a definite percentage each month and the Board is pleased to report that now all but a very few of these have their business on a sound basis or have turned them over to stronger hands, with comparatively little loss to producers.

"The bonding requirements of the Act, even though not preventing all losses, have given milk producers adequate protection."

In the Province of Quebec, Canada, "Every milk dealer, whose purchases exceed one hundred dollars per month, must give a guarantee for the payment of the sums which he owes or may owe to his producer-supplier." Dairy Products' Act, 23 Geo. V, c. 24, sec. 8.

These paragraphs, we submit, contain a just appraisal of the reason for and value of the statute at bar, while their foreign authorship should free them from the enthusiasm of a popular local program.

This recitation of similar statutes in many states has a worthy significance. As was said by Mr. Justice Cardozo in *Roman v. Lobe*, 243 N. Y. 51 at 55, after having remarked that the Legislatures of many States had adopted statutes similar to the one there at bar: "Legislation so general marks a rising tide of opinion which is suggestive and informing." Likewise, the reasonableness of the bond requirement "is made more probable" by the fact that it has been adopted in other states. *Bain Peanut Co. v. Pinson*, 282 U. S. 499 at 502.

There may be other jurisdictions having the same kind of bonding requirement. On the other hand, some states have found that their statutes enacted for the similar purpose of protecting milk producers have been obnoxious to their individual constitutions. Where there was no evident answer in the statute for the distinction as to operators of milk gathering stations the bond requirement was held an invalid exercise of the police power since no reasonable connection was apparent between the statute and the common good. *State v. Old Tavern Farm Inc.* [1935] 133 Maine 468; 180 Atlantic 473. And where there was found an unnecessary restriction on the right of contract, a

violation of the principle of equality and no provision for appeal to any court from the Dairy Commissioner's determination, a Connecticut bond provision was held invalid. *State v. Porter* [1920] 94 Conn. 639; 110 Atl. 59. For discussion of these cases see *Brock v. Valley Dairy Company, Inc.* Superior Court, Los Angeles County, California, August 3, 1937, upholding California statute, *supra*, guaranteeing payments to producers. In New York, however, experience and investigation disclosed valid reasons for the legislation. In Pennsylvania the purpose is declared in section 101 of the Act of April 28, 1937 (P. L. 417).

> "Section 101. Legislative Purpose.—In the exercise of the police power of the Commonwealth, it is hereby declared that the production, transportation, manufacture, processing, storage, distribution, and sale of milk in the Commonwealth is a business affecting the public health and affected with a public interest, and it is hereby declared that this act shall be and is hereby enacted for the purpose of regulating and controlling the milk industry in this Commonwealth, for the protection of the public health and welfare and for the prevention of fraud."

POINT I.

The filing of a bond conditioned for the payment of all amounts due producers for milk purchased is not a regulation of nor such a burden upon interstate commerce as to render the requirement unconstitutional.

The conclusion of law of the court below holding the bond requirement "a regulation of and a burden upon interstate commerce", (R. p. 24) is not enough to defeat state action nor to render invalid a commonwealth's proven legislative program for the protection of its citizens against fraud and attendant unrequited

pecuniary damage. Our thought in this regard is strikingly illustrated by the case of *South Carolina State Highway Department v. Barnwell Brothers Inc. et al.*, 303 U. S. 177; Official Preliminary Print Vol. 303—No. 1; Law Ed. Advance Opinions, Feb. 28, 1938. The act reviewed prohibited the use on state highways of motor trucks and "semi-trailer" motor trucks of a width exceeding 90 inches and weight including load in excess of 20,000 pounds. "The principal question for decision," said the court, "is whether these prohibitions impose an unconstitutional burden upon interstate commerce." The three-judge statutory court was of the opinion that although the Federal Motor Carriers' Act did not supersede the Carolina statute, the weight and width restrictions did place an unlawful burden upon interstate motor traffic. The Supreme Court reversed this holding. Following the citation of numerous cases, Mr. Justice Stone, speaking for the court said (Official Print p. 189; Law. Ed. p. 476):

> "In each of these cases regulation involves a burden on interstate commerce. But so long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states.
>
> "Congress, in the exercise of its plenary power to regulate interstate commerce, may determine whether the burdens imposed on it by state regulation, otherwise permissible, are too great, and may, by legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, curtail to some extent the state's regulatory power. But that is a legislative, not a judicial function, to be performed in the light of the Congressional judgment of what is appropriate regulation of interstate commerce, and the extent to which, in that field, state power

and local interests should be required to yield to the national authority and interest. In the absence of such legislation the judicial function, under the commerce clause as well as the Fourteenth Amendment, stops with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought. *Sproles v. Binford, supra; Stephenson v. Binford,* 287 U. S. 251, 272."

A second illustration of the same principle is found in *E. Pat Kelly v. State of Washington ex rel. Foss Co.,* (November 8, 1937) 302 U. S. 1. The respondents, owners of motor-driven tugs, sought to prevent enforcement of a State of Washington law relating to the inspection and regulation of vessels. The State Supreme Court held the statute invalid "if applied to the navigable waters over which the Federal Government has control." After hearing, reargument was ordered (301 U. S. 671) and the Attorney General of the United States was requested "to present the views of the Government" upon the question whether the state act "or the action of the officers of the State thereunder, conflicts with the authority of the United States or with the action of its officers under the Acts of Congress."

"The state court took the view that Congress had occupied the field and that no room was left for state action in relation to vessels plying on navigable waters within the control of the federal government", (p. 9), but Mr. Chief Justice Hughes, writing for the court, found that (pp. 9, 10):

"Under our constitutional system, there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction al-

though interstate commerce may be affected. Minnesota Rate Cases, 230 U. S. 352, 402. States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power. And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' *Sinnot v. Davenport*, 22 How. 227, 243; *Missouri, K. & T. Ry. Co. v. Haber*, 169 U. S. 613, 623, 624; *Reid v. Colorado*, 187 U. S. 137, 148; *Crossman v. Lurman*, 192 U. S. 189, 199, 200; *Asbell v. Kansas*, 209 U. S. 251, 257, 258; *Missouri Pacific Ry. Co. v. Larabee Mills*, 211 U. S. 612, 623; *Savage v. Jones*, 225 U. S. 501, 533; *Atlantic Coast Line v. Georgia*, 234 U. S. 280, 293, 294; *Carey v. South Dakota*, 250 U. S. 118, 122; *Atchison, T. & S. F. Ry. Co. v. Railroad Commission*, 283 U. S. 380, 392, 393; *Mintz v. Baldwin*, 289 U. S. 346, 350; *Gilvary v. Cuyahoga Valley Ry. Co., supra.**"

a—*Under Its Police Power, A State May Protect Its Citizens Against Fraud.*

The statutory purpose declared by the bonding legislation of the various states as heretofore disclosed seeks to protect producers from fraud or the possibility of it. It was not imaginary. It was known through bitter experience. It was found by legislative investi-

*292 U. S. 57.

gation. It was confirmed by the courts. Where "the general nature of the business is such, that unless regulated, many persons may be exposed to misfortunes against which the legislature can properly protect them",* the requirement is not in itself a regulation of interstate commerce, although it may in some degree effect those engaged in such traffic. *Sherlock v. Alling,* 93 U. S. 99, *Pennsylvania Railroad Company v. Hughes,* 191 U. S. 477.

In the present case, the respondent is a Pennsylvania corporation. It operates a milk plant in the State of Pennsylvania. It buys milk from Pennsylvania producers. The milk is brought to the plant by the producers themselves. It is there weighed by respondent. It is cooled. The milk of all the 175 producers is commingled so that the identity of the milk of any one producer is forever lost. Held at the plant for a period of less than twenty-four hours, the commingled milk is later shipped in fluid form by tank truck to a New York City destination (R. pps. 16, 17). The producer has delivered his product but in accordance with trade custom and practice he has not been paid for it. The protection of such persons against fraud is especially needed. Although declared with respect to an "inspection" statute, a quotation from *Reid v. Colorado,* 187 U. S. 137, 150, 151, pointedly reviews the doctrine here espoused.

> "Certain principles are well settled by the former decisions of this court. One is that the purpose of a statute, in whatever language it may be framed, must be determined by its natural and reasonable effect. *Henderson v. New York,* 92 U. S. 259, 268, sub nom. *Henderson v. Wickham,* 23 L. ed. 543, 548. Another is, that a state may not,

*Brazee v. Michigan, 241 U. S. 340, 343.

by its police regulations, whatever their object, unnecessarily burden foreign or interstate commerce. *Hannibal & St. J. R. Co. v. Husen,* 95 U. S. 465, 472, 24 L. ed. 527, 531. Again, the acknowledged police powers of a state cannot legitimately be exerted so as to defeat or impair a right secured by the national Constitution, any more than to defeat or impair a statute passed by Congress in pursuance of the powers granted to it. *Gibbons v. Ogden,* 9 Wheat. 1, 210, 6 L. ed. 23, 73; *Missouri, K. & T. R. Co. v. Haber,* 169 U. S. 613, 625, 626, 42 L. ed. 878, 882, 18 Sup. Ct. Rep. 488, and authorities cited.

"Now, it is said that the defendant has a right under the Constitution of the United States to ship live stock from one state to another state. This will be conceded on all hands. But the defendant is not given by that instrument the *right* to introduce into a state, against its will, live stock affected by a contagious, infectious, or communicable disease, and whose presence in the state will or may be injurious to its domestic animals. The state—Congress not having assumed charge of the matter as involved in interstate commerce—may protect its people and their property against such dangers, taking care always that the means employed to that end do not go beyond the necessities of the case or unreasonably burden the exercise of privileges secured by the Constitution of the United States."

The state has power to prevent frauds and impositions, *Hall v. Geiger-Jones Co.,* 242 U. S. 539, 552.

b—*The Bond Requirement Does Not "Regulate" Interstate Commerce and Any Burden Upon It Is Incidental, Not Undue Nor Unreasonable.*

We do not believe it may be successfully argued that the filing of a commission merchant's bond protecting persons consigning farm produce for sale on commis-

mission differs in purpose and intent from the milk bond requirement. In *Hartford Indemnity Co. v. Illinois,* 298 U. S. 155, 157, an Illinois statute forbidding the sale or offering for sale of farm produce on commission unless licensed *and bonded* came up for judicial review.

> "The Cross Company took licenses, and the appellant became surety on its bonds, for the years ending July 1, 1932, and July 1, 1933. In October, 1932, the Cross Company became bankrupt and failed to account for numerous consignments of fresh fruits and vegetables. Some were shipped from Illinois but most were from other states. The Director of Agriculture brought actions in a state court on both bonds. The court consolidated the cases and they were tried together on stipulated facts.
>
> "The appellant, in addition to defenses raising no federal question, pleaded that the statute was beyond the state's power because a restriction upon, and a regulation of, interstate commerce. Judgment was entered against the Cross Company and the appellant. Both appealed to the Supreme Court of the State, which affirmed the judgment. The appellant summoned and severed the Cross Company and prosecuted an appeal to this court.
>
> "The sole question presented is the constitutional validity of the act as it affects the appellant's liability under its bonds. The statute is a police regulation. The business regulated is local, having its situs within the state and being conducted therein. The fact that the commission merchant contracts to sell, and sells, farm produce forwarded to him from points without, as well as points within, the state is not enough to condemn the regulation of a business carried on within her borders. Such effect as the regulation has upon interstate commerce is indirect and incidental and does not trespass upon the power conferred on Congress by Article I, § 8, of the federal Constitution. In these circumstances, until

> Congress, under the commerce power, adopts inconsistent legislation, that of the state remains effective." (See footnote citations.)

It was said in *Townsend v. Yeomans,* 301 U. S. 441 that "the legislature, acting within its sphere, is presumed to know the needs of the people of the State." There, suit was brought by tobacco warehousemen to restrain the enforcement of a Georgia statute fixing maximum charges for handling and selling leaf tobacco. The main contention of the appellants was "that the State had no power to enact the regulation as it attempted to govern transactions in the course of interstate and foreign commerce." It was further urged "that practically all the tobacco grown in Georgia is shipped out of the State." "The purchasers at the 'markets' in Georgia for the most part are manufacturers of cigarettes who *immediately** have the tobacco transported to their plants outside the State; that the purchases made by speculators and warehousemen are for the purpose of resale as soon as possible to the cigarette manufacturers, and thus that the tobacco so bought, as well as the rest, 'is destined for interstate or foreign shipment.' " There was found "no ground for concluding that the state requirements lay any *actual* burden upon interstate or foreign commerce." (pps. 441, 452, 455.)

The true test should be the nature of the activity regulated by Pennsylvania and not whether respondent buys milk and resells it there (although for shipment in interstate commerce) or whether the milk bought is later shipped outside the State by the original purchaser.**

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*Italics ours.

**Federal Compress Co. v. McLean, 291 U. S. 17.
Chassaniol v. Greenwood, 291 U. S. 584.

Finally.

It is respectfully submitted that the bonding provision is constitutional and that the judgment below should be reversed.

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PETITION

REHEARI

FOR

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 426

MILK CONTROL BOARD OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

vs.

EISENBERG FARM PRODUCTS, A PENNSYLVANIA CORPORATION.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

PETITION FOR REHEARING.

THOMAS D. CALDWELL,
ROBERT T. FOX,
CARL B. STONER,
MAURICE YOFFEE,
Counsel for Respondent.

INDEX.

Table of Cases Cited.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

PETITION FOR REARGUMENT.

To the Honorables the Justices of Said Court:

The petition of Eisenberg Farm Products, by Thomas D. Caldwell, of counsel, respectfully prays your Honorable Court to grant a reargument for the following reasons:

1. Counsel for the petitioner feels that he has failed to make his position clear at the argument before this Honorable Court.

2. In the opinion of your petitioner, the opinion represents a change in the basic law regarding interstate commerce as it has existed, apparently, since the adoption of the commerce clause.

3. Your petitioner feels that the far reaching consequences of this decision have not been sufficiently emphasized to the Court. If carried to its logical conclusion it means that Minnesota can fix the price of forest products, Oregon the price of apples, Pennsylvania the price of coal and so on *ad infinitum* throughout the forty-eight States.

(A) The effect of the present situation will be that forty-seven other States can regulate on matters expressly reserved to the Federal Government, thus resulting in a strained conception of the powers of the Federal Government.

4. The opinion does not refer to the language of late Justice Cardozo in the Highland Dairy case, 300 U. S. 608, in which he said:

> "High in Virginia may buy from Highland in Washington at any price they choose."

Counsel cannot see how this case can be distinguished from the case at bar. Apparently the *Highland* case was not sufficiently brought to the attention of the Court.

5. It is submitted that this Act does, in fact, fix a price which the consumer in New York must pay for this Pennsylvania milk. If the Milk Control Board says that the producer must receive five cents a quart for milk, then obviously the New York price cannot be less than five cents plus the dealer's cost of delivering the milk to the consumer, which includes overhead and profit.

(A) Is it not, therefore, beside the point to say that the Pennsylvania Act does not attempt to fix the price in New York State?

6. A State cannot camouflage a statute or situation with a police power argument, if the result will invade a province exclusively set aside for National control.

(A) In *DiSanto* v. *Pennsylvania*, 273 U. S. 34, this Honorable Court held:

> "A state statute which by its necessary operation directly interferes with or burdens foreign commerce, is a prohibited regulation and invalid, regardless of the purpose with which it was passed. * * * Such regulation cannot be sustained as an exercise of the police power of the state to prevent possible fraud."

(B) The instrumentality or agency through which interstate commerce flows can be regulated by the State as being of a local nature even though interstate commerce is indirectly affected, but a State cannot, under any guise, regulate or burden the prosecution of interstate commerce (see *Baldwin* v. *Seelig*, 294 U. S. 511).

(C) The result of such regulation will eventually set a barrier to traffic between one State and another.

(D) The situation in the instant case is no more of a local nature than the situation in *Covington & Cincinnati Bridge Company* v. *Kentucky*, 154 U. S. 204, where the Commonwealth of Kentucky attempted to prescribe a schedule of tolls upon a bridge connecting with the State of Ohio.

(E) The situation in the instant case is likewise no more local in nature than the situation in the case of *Reading Railroad Company* v. *Pennsylvania*, 15 Wall. 232, wherein the Comomnwealth of Pennsylvania attempted to lay a tax on commodities transported in interstate commerce. The court held in the *Reading Railroad* case, *supra*, that the imposition of the tax, whether large or small, was a restraint upon the privilege or right to have the subjects of commerce passed freely from one State to another without being ob-

structed by the intervention of State license. Its payment was a condition upon which the prosecution of that branch of commerce was made to depend and its imposition, therefore, was in conflict with the power of Congress over the subject.

(1) In the instant case, the Commonwealth of Pennsylvania is attempting to do exactly what it attempted to do in the *Reading Railroad Company* case and which was held invalid.

(2) The fact that in the one case it is a tax and in the other a regulation, is of no legal significance as we are primarily interested in the result.

(F) In the case of *Port of Port Angeles* v. *Henneford*, 74 P. (2d), 1025, the business was local in nature though the tax was levied on the corporation engaged in interstate commerce. The court held that the dock companies' earnings from transporting goods arriving from other States are realized from operations in "interstate commerce" and hence not subject to State business and occupation tax, even though the business of the company was purely local in character.

(G) In view of the fact that this Honorable Court in the case of *Baldwin* v. *Seelig, supra*, held that the State of New York could not regulate the price of milk to be paid in Vermont for milk shipped into New York, the converse of this ruling should likewise logically follow, especially where the Commonwealth of Pennsylvania attempts to fix the price of milk in New York by indirection.

7. The opinion of the Court states that only a small fraction of the milk produced in Pennsylvania is shipped in interstate commerce and, therefore, the regulation is indirect.

(A) We respectfully submit that the amount of milk actually shipped in interstate commerce as compared to the amount of milk produced in the Commonwealth of Pennsylvania, is not the test with respect to the right of regulation. It has been aptly stated by the United States Supreme Court in *Public Utility Commission* v. *Attleboro Steam and Electric Company*, 273 U. S. 83:

> "The test of the validity of a state regulation is not the character of the general business of the company, but whether the particular business which is regulated is essentially local or national in character; and if the regulation places a direct burden upon its interstate business, it is none the less beyond the power of the state because this may be a smaller part of its general business."

8. Even though the State statute in the instant case was not directed solely against interstate commerce, if it has that effect, it is invalid.

(A) The Learned Chancellor of the court below held:

> "Undoubtedly the laws of Pennsylvania relating to milk control were not enacted for the primary purpose of regulating interstate commerce, but if they have that effect they are invalid as applied to such interstate commerce regardless of the proportion which such commerce bears to the total commerce of the state."

(B) The statute has that effect since it requires the respondent in the instant case to pay the milk producers not the agreed price but the *price fixed by the Commisison* and also to post a bond to secure payment to producers of the prices fixed by the Commission and also to pay license fees, and hence the cost of the milk to it would be increased by the premium on the bond, by the license fee and by the increase in price ordered by the Commission. The effect of such regulation and such price fixing would be exactly equivalent to the imposition of a tax on the export of milk.

(C) The Milk Control Act provides that the milk can be purchased only subject to the minimum price established by the Milk Control Commission. That is, under the asserted authority the Milk Control Commission may fix and determine the price to be paid for milk which is bought, shipped and sold in interstate commerce.

(D) The statute denies the privilege of engaging in interstate commerce except to dealers licensed by the Commonwealth of Pennsylvania and provides a system which enables the Milk Control Commission to fix the profit which may be made in dealing with the subject matter of interstate commerce.

(E) It can readily be seen that though the statute was not aimed directly at interstate commerce, its effect on interstate commerce is obvious and hence invalid.

9. It has been the law of this Honorable Court for years in the past that State statutes fixing prices of articles in interstate commerce are invalid.

(A) Since it is conceded that the milk shipped to New York in the instant case is in interstate commerce and that the buying as well as the shipping constitutes one transaction, any effort on the part of the Commonwealth of Pennsylvania to establish a price minimum, regulates prices in interstate commerce.

(1) If the respondent is to pay the minimum price in Pennsylvania, plus the premium on the bond and the expenses incident to the movement of milk in interstate commerce, it must sell the milk in New York for a price equivalent to its overhead, plus a fair profit. *It must sell at a certain price in New York to continue to do business.*

(a) The Commonwealth of Pennsylvania is establishing the price, by indirection, at which milk can be sold in

New York. This, we contend, cannot be done directly and certainly cannot be done by indirection.

(2) In the case of *United States* v. *Seven Oaks Dairy Company*, 10 Fed. Supp. 995, it was held that where the business involved interstate commerce, State statutes regulating prices have been declared invalid as a direct burden on interstate commerce.

(3) In *Lemke* v. *Farmers Grain Company*, 258 U. S. 50, the Act attempted to regulate the price at which grain was bought, shipped and sold in interstate commerce. To the same effect is the case of *Shafer* v. *Farmers Grain Company*, 268 U. S. 189. These two cases are familiarly known as the "Farmers Grain Company cases" and in both instances this Honorable Court held that the regulation was invalid because it was a regulation of interstate commerce, directly affecting the price of the commodities moving in said interstate commerce.

(4) In *Stafford et al.* v. *Wallace et al.*, 258 U. S. 495, the court held:

"Accordingly a state statute which sought to regulate the price and profit of such sales was found to interfere with the free flow of interstate commerce was declared invalid as a violation of the Commerce Clause."

(B) Since it is obvious that the Commonwealth of Pennsylvania is indirectly regulating the price at which milk is to be sold in New York and since under the authority of the cases cited *supra*, such regulatory statutes are invalid, it follows that the price-fixing feature in the Pennsylvania statute must likewise be declared invalid with respect to milk shipped in interstate commerce.

(C) To substantiate our position that the Pennsylvania statute is a price-fixing statute, we call this Honorable

Court's attention to the requirement of a bond wherein a milk dealer must post a bond to secure payment to the producers of the prices fixed by the Milk Control Commission and not the agreed price between the distributor and the milk producer. To permit the present opinion to stand would mean that the very important case commonly referred to as the "*Minnesota Rate case*", in 230 U. S. 352, would be of no legal effect. In that case the United States Supreme Court established the principle and its limitations with respect to Federal and State power and laid down a basic doctrine for matters pertaining to State and Federal control.

10. All of the cases relied upon by the Commonwealth of Pennsylvania had no relation whatever to the purchase or sale of the commodity in interstate commerce. They were either inspection measures, quarantine measures or regulatory measures of the instrumentality through which interstate commerce might flow. This is quite different from the facts in the instant case where the regulatory measure directly controls the commodities in interstate commerce.

(A) We argued in our original brief that the regulatory measure in the instant case could not be considered an inspection law, in view of the innumerable Acts passed covering the period from 1853 to 1935, prohibiting the sale of impure and unwholesome milk and prescribing a host of regulations to insure such supply.

11. It might be desirable for the Pennsylvania Milk Control Commission to stabilize the dairy industry and it might be necessary for it to regulate the transactions of the respondent and other buyers of milk, similarly engaged and it might be necessary to protect the milk producers from fraud and to secure payment for them of fair prices for the milk actually sold, but there can be no justification for the exercise of the power which the Commonwealth of Pennsylvania is attempting to exercise when it does not possess that

power. Congress is amply authorized to pass measures to protect interstate commerce. These supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of laws which greatly encroach upon the field of interstate commerce, placed by the constitution under Federal control.

12. Congress alone can deal with transactions in interstate commerce; its non action is a declaration that it shall remain free from burdens imposed by State regulation.

(A) A State statute in many instances can regulate interstate commerce in an inconsequential way when Congress has not acted, but where a State passes beyond the exercise of its legitimate authority and undertakes to regulate interstate commerce by imposing direct burdens upon it, these regulations are invalid.

(B) In *Gloucester Ferry Company* v. *Pennsylvania*, 114 U. S. 196, the Commonwealth of Pennsylvania attempted to tax the capital stock of a corporation whose entire business consisted of ferrying passengers and freight between Pennsylvania and New Jersey. This business was clearly in interstate commerce and the court held:

> "Congress alone, therefore, can deal with such transportation; its non action is a declaration that it shall remain free from burdens imposed by state regulation. Otherwise, there would be no protection against conflicting regulations of different States, each regulating in favor of its own citizens and products and against those of other States."

(C) To the same effect is the case of *Oklahoma* v. *Kansas Natural Gas Company*, 265 U. S. 298. The State of Missouri attempted to regulate interstate commerce. The court declared the Act unconstitutional and held:

> "But Congress thus far has not seen fit to regulate it and its silence, where it has the sole power to speak,

> is equivalent to a declaration that that particular commerce shall be free from regulation."

(D) To the same effect are the cases of *Pennsylvania Railroad* v. *Driscoll*, 198 Atl. 130; *Pennsylvania* v. *West Virginia*, 262 U. S. 553.

Authorities.

In *J. D. Adams Manufacturing Company* v. *Storen*, 58 Sup. Ct. 913, an Indiana Act imposed a tax on income regardless of the source. It appeared that the appellant in the case sold eighty per cent of its products in interstate commerce. This Honorable Court held that the income derived from interstate commerce cannot be taxed. It would, therefore, follow as a corollary that the products themselves could not be taxed. Applying this decision to the instant case, it would follow that milk shipped in interstate commerce could not be taxed and the income derived from said milk could likewise not be taxed. This is so even though the receipt of the income is of a local nature.

In the case of *Highland Farms Dairy, Inc.*, v. *Agnew*, 300 U. S. 608, the late Mr. Justice Cardozo stated a principle in one sentence which controls the instant case. Mr. Justice Cardozo held:

> "Highland in Washington may sell to High in Virginia and High may buy from Highland, at any price they please."

Why should not the same principle apply to the instant case? It being conceded that the milk bought was shipped in interstate commerce, the milk receiving plant, following out Mr. Justice Cardozo's statement, should be able to purchase milk from the producers in Pennsylvania at any price it sees fit. We are at a loss to understand how this Honorable Court arrived at the conclusion it did in the face of the very illuminating opinion of the late Mr.

Justice Cardozo in the *Highland Farms Dairy, Inc.*, case, *supra.*

In *Motor Transit Company* v. *Railroad Commission of California,* 15 Fed. Supp. 630, a State statute required each agent of a motor stage company selling tickets over highways of the State and across the State line, to procure a license and a five thousand dollar bond, conditioned on the faithful performance of the contract of employment. The court declared the Act unconstitutional as burdening interstate commerce. This regulation was clearly a safety regulation designed for the protection of the public and to insure extra precautions to it. This regulation was clearly of a local nature as it pertained to transportation in the State of passengers across the State lines. The instant case should likewise be governed by the decision of the *Motor Transit Company* case, *supra.*

To summarize briefly the distinction between the line of cases relied upon by the Milk Control Commission and the cases relied upon by the respondent, we quote from the opinion of the Learned Chancellor below (R. 29):

> "The distinction between Munn *v.* Illinois, Townsend *v.* Yeomans, and other cases relied upon by the plaintiff, on the one hand, and the Farmers' Grain Company cases and the present case, on the other, lies in the fact that in the former the regulation was confined to warehouses, elevators, or other agencies through which interstate commerce might flow, but whose activities were entirely intrastate. In the latter cases the statute sought to regulate the act of purchasing articles which were to be shipped in interstate commerce, and to prohibit such purchases unless made upon terms prescribed by the statute and administrative agencies. It is not the milk receiving plant operated by the defendant that the plaintiff seeks to regulate, but the business conducted by the defendant of buying and shipping milk."

(A) We respectfully submit that this clear-cut distinction is in harmony with the law of this Honorable Court as has existed for years in the past, and a confirmation of said distinction will settle the law.

WHEREFORE, in consideration of the foregoing matters, Eisenberg Farm Products prays that a reargument be granted in the above captioned case in order that the grave matters of public concern herein involved may be further considered.

EISENBERG FARM PRODUCTS,
By THOMAS D. CALDWELL,
Counsel.

STATE OF PENNSYLVANIA,
County of Dauphin, ss:

Before me, a Notary Public in and for said State and County, personally appeared Thomas D. Caldwell who, being duly sworn according to law, doth depose and say that he is the attorney of record for Eisenberg Farm Products and is duly authorized to execute the foregoing petition and make affidavit thereto; that the facts set forth in the foregoing petition are true and correct to the best of his knowledge, information and belief and that this petition is presented in good faith and not for the purpose of delay.

THOMAS D. CALDWELL.

Sworn to and susbcribed before me this 23rd day of March, A. D., 1939.

JEAN R. GEER,
[SEAL.] *Notary Public.*

My commission expires March 9, 1943.

SUPREME COURT OF THE UNITED STATES.

No. 426.—October Term, 1938.

Milk Control Board of the Commonwealth of Pennsylvania, Petitioner, *vs.* Eisenberg Farm Products. } On Writ of Certiorari to the Supreme Court of Pennsylvania.

[February 27, 1939.]

Mr. Justice Roberts delivered the opinion of the Court.

We are called upon to determine whether a local police regulation unconstitutionally regulates or burdens interstate commerce.

Pennsylvania, by an Act of April 30, 1935[1] has declared the milk industry in that Commonwealth to be a business affected with a public interest. The statute defines a milk dealer as any person "who purchases or handles milk within the Commonwealth for sale, shipment, storage, processing or manufacture within or without the Commonwealth." It creates a Milk Control Board with authority to investigate, supervise, and regulate the industry and imposes penalties for violations of the law or of the Board's orders issued pursuant to the law, and requires a dealer to obtain a license by application to the Board. Licenses may be refused, suspended, or revoked for specified causes. A requisite of obtaining a license is that the dealer shall file with the Board a bond conditioned for the prompt payment of all amounts due to producers for milk purchased by the licensee. The act empowers the Board to require the dealer to keep certain records and directs the Board, with the approval of the Governor, to "fix, by official order, the minimum prices to be paid by milk dealers to producers and others for milk." The Board may vary the price according to the production, use, form, grade or class of milk.[2]

The petitioner, the Milk Control Board, filed its bill in a Common Pleas Court to restrain the appellee from continuing to do business without complying with the statute. The respondent by its answer sought to justify failure to comply on the ground that it was engaged in interstate commerce. After trial the court dis-

[1] P. L. 96; 31 P. S. Sec. 684.

[2] The act was repealed by an Act of April 28, 1937, P. L. 417, but all proceedings under it were saved by Section 1203 of the later act. See Commonwealth v. Ortwein, 200 Atl. 859.

missed the bill. The Supreme Court of Pennsylvania affirmed the decree.[3]

The respondent, a Pennsylvania corporation, leases and operates a milk receiving plant in Elizabethville, Pennsylvania, at which it buys milk from approximately one hundred and seventy-five farmers in the neighborhood, who bring their milk to the plant in their own cans. There the milk is weighed and tested by the respondent and emptied into large receiving tanks in which it is cooled preparatory to shipment. This requires retention of the milk for less than twenty-four hours; it is not processed, and no change occurs in its constituent elements. The milk is then drawn from the cooling tanks into tank trucks operated by a contract carrier and transported into New York City for sale there by the respondent. The journey is continuous from Elizabethville to New York City. All milk purchased by the respondent at Elizabethville is shipped to and sold in New York. During the year 1934 approximately 4,500,000,000 pounds of milk were produced in Pennsylvania of which approximately 470,000,000 pounds were shipped out of the state.

The respondent contends that the act, if construed to require it to obtain a license, to file a bond for the protection of producers, and to pay the farmers the prices prescribed by the Board, unconstitutionally regulates and burdens interstate commerce. The State Supreme Court has held that the statute is a valid police regulation.[4] The petitioner concedes that the purchase, shipment into another state, and sale there of the milk in which the respondent deals is interstate commerce. The question for decision is whether, in the absence of federal regulation, the enforcement of the statute is prohibited by Article I, Section 8 of the Constitution. We hold that it is not.

When the people declared "The Congress shall have Power . . . To regulate Commerce . . . among the several States," . . . their purpose was clear. The United States could not exist as a nation if each of them were to have the power to forbid imports from another state, to sanction the rights of citizens to transport their goods interstate, or to discriminate as between neighboring states in admitting articles produced therein. The grant of the power of regulation to the Congress necessarily implies the subor-

[3] 332 Pa. 34; 200 Atl. 854.

[4] See the opinion below, and Colteryahn Sanitary Dairy v. Milk Control Commission, 332 Pa. 15, 1 Atl. 2d, 775; Keystone Dairy Co. v. Milk Control Commission, 332 Pa. 15, 1 Atl. 2d, 775; Rohrer v. Milk Control Board, 322 Pa. 257, 186 Atl. 336.

dination of the states to that power. This court has repeatedly declared that the grant established the immunity of interstate commerce from the control of the states respecting all those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation must be prescribed by a single authority.[5] But in matters requiring diversity of treatment according to the special requirements of local conditions, the states remain free to act within their respective jurisdictions until Congress sees fit to act in the exercise of its overriding authority.[6] One of the commonest forms of state action is the exercise of the police power directed to the control of local conditions and exerted in the interest of the welfare of the state's citizens. Every state police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce. This is so even though, should Congress determine to exercise its paramount power, the state law might thereby be restricted in operation or rendered unenforceable.[7] These principles have guided judicial decision for more than a century. Clearly they not only are inevitable corollaries of the constitutional provision, but their unimpaired enforcement is of the highest importance to the continued existence of our dual form of government. The difficulty arises not in their statement or in a ready assent to their propriety, but in their application in connection with the myriad variations in the methods and incidents of commercial intercourse.

The purpose of the statute under review obviously is to reach a domestic situation in the interest of the welfare of the producers and consumers of milk in Pennsylvania. Its provisions with respect to license, bond, and regulation of prices to be paid to producers are appropriate means to the ends in view. The question is whether the prescription of prices to be paid producers in the effort to accomplish these ends constitutes a prohibited burden on interstate commerce, or an incidental burden which is permissible until superseded by Congressional enactment. That question can be answered only by weighing the nature of the respondent's activities, and the propriety of local regulation of them, as disclosed by the record.

The respondent maintains a receiving station in Pennsylvania where it conducts the local business of buying milk. At that station

[5] The Minnesota Rate Cases, 230 U. S. 352, 399, and cases cited.
[6] *Ibid.*
[7] *Ibid.*, pp. 402-403.

the neighboring farmers deliver their milk. The activity affected by the regulation is essentially local in Pennsylvania. Upon the completion of that transaction the respondent engages in conserving and transporting its own property. The Commonwealth does not essay to regulate or to restrain the shipment of the respondent's milk into New York or to regulate its sale or the price at which respondent may sell it in New York. If dealers conducting receiving stations in various localities in Pennsylvania were free to ignore the requirements of the statute on the ground that all or a part of the milk they purchase is destined to another state the uniform operation of the statute locally would be crippled and might be impracticable. Only a small fraction of the milk produced by farmers in Pennsylvania is shipped out of the Commonwealth. There is, therefore, a comparatively large field remotely affecting and wholly unrelated to interstate commerce within which the statute operates. These considerations we think justify the conclusion that the effect of the law on interstate commerce is incidental and not forbidden by the Constitution, in the absence of regulation by Congress.

None of the decisions on which the court below and the respondent rely rules the instant case. *DiSanto* v. *Pennsylvania,* 273 U. S. 34, involved a state law directed solely at foreign commerce; *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50 condemned a state statute affecting commerce, over ninety per cent. of which was interstate and essaying to regulate the price of commodities sold within the state payable and receivable in the state of destination; *Shafer* v. *Farmers Grain Co.,* 268 U. S. 189, also dealt with a state law intended to regulate commerce almost wholly interstate in character. In *Baldwin* v. *Seelig,* 294 U. S. 511, this court condemned an enactment aimed solely at interstate commerce attempting to affect and regulate the price to be paid for milk in a sister state, and we indicated that the attempt amounted in effect to a tariff barrier set up against milk imported into the enacting state.

The decree must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

So ordered.

Mr. Justice McReynolds and Mr. Justice Butler are of opinion that the Supreme Court of Pennsylvania properly concluded that under former opinions of this Court the questioned regulations constituted a burden upon interstate commerce prohibited by the Federal Constitution.